

2006

# Love Knows No Borders—The Same-sex Marriage Debate and Immigration Laws

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## Recommended Citation

Zaske, Amy K. R. (2006) "Love Knows No Borders—The Same-sex Marriage Debate and Immigration Laws," *William Mitchell Law Review*: Vol. 32: Iss. 2, Article 9.

Available at: <http://open.mitchellhamline.edu/wmlr/vol32/iss2/9>

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## NOTE: LOVE KNOWS NO BORDERS—THE SAME-SEX MARRIAGE DEBATE AND IMMIGRATION LAWS

Amy K.R. Zaske<sup>†</sup>

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## I. INTRODUCTION

Legal recognition of same-sex partnerships through marriage or civil unions is currently a contentious issue in the United States. There have been many changes and challenges to the current laws during the past several years.<sup>1</sup> Currently, the U.S. legal system only recognizes marriage as between a man and a woman, and this concept has been strictly adhered to with regard to most federal and state laws.<sup>2</sup> This includes U.S. immigration laws, which do not currently provide a means for persons in long-term committed relationships with a member of the same sex, who may be from another country, to sponsor that partner for immigration into the United States.<sup>3</sup> The deficiency in the U.S. immigration laws is arguably discriminatory in that it does not afford the same or similar benefits to same-sex couples as it does to opposite-sex couples.<sup>4</sup>

In an effort to rectify this arguably discriminatory treatment of same-sex couples, the Permanent Partners Immigration Act (PPIA) was introduced in the House of Representatives as a bill to amend

1. Same-sex marriage was the number one issue in the 2004 elections based on the number of states addressing it and the volatile nature of the surrounding debate on the issue. David Crary, *Marijuana, Minimum Wage and Same-Sex Marriage Among Hot Topics on Nov. 2 Ballots*, ASSOCIATED PRESS, AP ONLINE, Oct. 23, 2004.

2. See *In re Kandu*, 315 B.R. 123 (Bankr. W.D. Wash. 2004) (dismissing suit in bankruptcy court by a lesbian couple who married in Canada and filed a joint chapter 7 bankruptcy petition due to improper joint filing of unmarried individuals); see also *Lockyer v. City of San Francisco*, 95 P.3d 459 (Cal. 2004) (holding that the mayor of San Francisco exceeded his authority when he allowed the city to issue marriage licenses to homosexual couples; the court declared these marriage licenses invalid).

3. Foreign nationals who marry U.S. Citizens and are of the opposite sex are eligible to apply for legal permanent resident status in the United States (a "green card"). Immigration and Nationality Act (INA) § 201(b)(2)(A)(i), 8 U.S.C. § 1151(b)(2)(A)(i) (2000); INA § 204(a)(1)(A)(i), 8 U.S.C. § 1154(a)(1)(A)(i) (2000).

4. See generally Nora V. Demleitner, *How Much Do Western Democracies Value Family and Marriage?: Immigration Law's Conflicted Answers*, 32 HOFSTRA L. REV. 273 (2003), for a discussion of U.S. immigration laws' disparate impact on same-sex families.

the Immigration and Nationality Act (INA).<sup>5</sup> The PPIA would provide a vehicle for the immigration sponsorship of same-sex partners of U.S. citizens and Permanent Residents.<sup>6</sup> On June 21, 2005, the bill was referred to the House Committee on the Judiciary.<sup>7</sup>

In this area of the law, the United States has lagged behind several other countries around the world that offer immigration benefits for same-sex partners. Eighteen countries currently offer immigration benefits to same-sex partners.<sup>8</sup> The United States, which has often placed itself in the role of a world leader in human rights, is not keeping pace with these countries that recognize the importance of allowing same-sex couples immigration benefits to help such couples remain together.

This issue of same-sex partnerships receiving immigration benefits is best understood when viewed in the context of the current controversy surrounding same-sex marriage. As same-sex couples have challenged current laws and restrictions on marriage, meeting with varying degrees of success,<sup>9</sup> voters and legislators have responded by tightening existing laws, enacting new laws, and proposing legislation that limits legal marriages in the United States to being solely between one man and one woman.<sup>10</sup>

This Note begins by exploring the history of U.S. immigration laws affecting same-sex partners and homosexuals and looks at current immigration options available to same-sex partners.<sup>11</sup> The next section discusses the PPIA's genesis and examines it in the context of the current political climate and laws in the United

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5. H.R. 3006, 109th Cong. (2005). This latest introduction of the bill is under the new name of the "Uniting American Families Act," although the short title includes both the new name and the former name of "Permanent Partners Immigration Act." 151 CONG. REC. S6917 (daily ed. June 21, 2005) (statement of Sen. Leahy). The bill had previously been introduced solely under the name "Permanent Partners Immigration Act." See H.R. 832, 108th Cong. (2003). Although the reasoning behind the new name is not noted, a reasonable inference would be that the new name appears to have less of a connection to same-sex marriage or partnership. For ease of continuity, references in this Note to the Permanent Partners Immigration Act (PPIA) will also mean the Uniting American Families Act.

6. H.R. 3006, 109th Cong. (2005).

7. H.R. 3006 Summary and Status.

8. See *infra* Part III.

9. See discussion *infra* Part II.D.1.

10. See discussion *infra* Part II.D.2.

11. See *infra* Part II.A-B.

States.<sup>12</sup> The Note continues by examining current literature discussing the PPIA and same-sex immigration benefits in the United States.<sup>13</sup> The following section discusses different types of immigration laws in the eighteen countries that currently grant immigration benefits to same-sex partners.<sup>14</sup> Next, this Note analyzes how the proposed PPIA would work and considers what a comparative analysis of the immigration laws of other countries suggests for implementation of the PPIA in the United States.<sup>15</sup> This Note concludes that the present version of the PPIA is discriminatory in many respects, but nonetheless represents an improvement from current U.S. immigration law.<sup>16</sup>

## II. HISTORY AND OVERVIEW OF RELEVANT LAWS

Immigrants to the United States are currently processed through the U.S. Citizenship and Immigration Service (USCIS), which is a component of the Department of Homeland Security (DHS).<sup>17</sup> The USCIS was formerly known as the Immigration and Naturalization Service (INS).<sup>18</sup>

Historically, homosexuality could prevent a person from legally immigrating to the United States and was grounds for deportation.<sup>19</sup> As immigration laws evolved, this changed and homosexuality ceased to be a reason for deportation or a bar to admission into the United States.<sup>20</sup>

12. See *infra* Part II.C-D.

13. See *infra* Part II.E.

14. See *infra* Part III.

15. See *infra* Part IV.

16. See *infra* Part V.

17. Name Change from the Bureau of Citizenship and Immigration Services to U.S. Citizenship and Immigration Services, 69 Fed. Reg. 197, 60937-38 (Oct. 13, 2004) (codified at 8 C.F.R. pt. 214). DHS was established after the terrorist attacks of September 11, 2001. See *id.* As a component of DHS, the first stated priority of the USCIS is to promote national security. USCIS, <http://uscis.gov/graphics/aboutus/thisisimm/index.htm>.

18. USCIS, *supra* note 17.

19. Christine Flowers, *The Permanent Partners Immigration Act: Will It Even the Playing Field for Gay and Lesbian Noncitizens?* IMMIGRATION LAW TODAY, AILA, July/Aug. 2003, at 14. The U.S. Public Health Service, the advisory body to the U.S. Congress that determined the physical and mental fitness of prospective immigrants, considered homosexuality a mental defect, which was grounds for exclusion from admission into the United States under the INA. *Id.*

20. Christopher A. Dueñas, *Coming to America: The Immigration Obstacle Facing Binational Same-Sex Couples*, 73 S. CAL. L. REV. 811, 825 (2000).

A. *History of U.S. Immigration Laws Affecting Same-Sex Partners and Homosexual Individuals*

In the early twentieth century, homosexuality served as grounds for denial of an application for admission into the United States.<sup>21</sup> During that time, homosexuality was considered to be a “mental defect” that rendered applicants inadmissible.<sup>22</sup> Although homosexuality was not specifically mentioned under the statutes at the time, it was used this way in practice.<sup>23</sup> In the mid-1970s, however, homosexuality was officially removed from the American Psychiatric Association’s list of mental illnesses,<sup>24</sup> which precipitated changes in the INS’s policy of using homosexuality as a reason for denying applications for entry into the United States.<sup>25</sup>

In 1982, there was a great setback for recognition of same-sex couples for immigration purposes. In *Adams v. Howerton*,<sup>26</sup> a same-sex couple—Adams, an American Citizen, and Sullivan, a foreign national—obtained a marriage license in Boulder, Colorado and were married by a local minister.<sup>27</sup> Adams then submitted an immigration petition for sponsorship of Sullivan as his spouse, which the INS denied.<sup>28</sup> Adams and Sullivan challenged the decision, but the Board of Immigration Appeals (BIA) upheld the denial of their application.<sup>29</sup>

The couple filed an action in district court challenging the decision on statutory grounds and on the grounds that it is unconstitutional to interpret the term “spouse” as used in the INA to mean only a person of the opposite sex.<sup>30</sup> The district court found for the INS, and this decision was also appealed.<sup>31</sup> The

21. Flowers, *supra* note 19, at 14.

22. *Id.*

23. *Id.*

24. Thomas Prol & Daniel Weiss, *Lifting a Lamp—Will New Jersey Create a Safe Harbor for Gay and Lesbian Immigration Rights?*, 227 N.J. LAW. 22, Apr. 2004, at 24.

25. Flowers, *supra* note 19, at 16.

26. 673 F.2d 1036 (9th Cir. 1982), *cert. denied*, 458 U.S. 1111 (1982).

27. *Id.* at 1038.

28. *Id.*

29. *Id.*

30. *Id.* “Two questions are presented in this appeal: first, whether a citizen’s spouse within the meaning of section 201(b) of the [Immigration and Nationality] Act must be an individual of the opposite sex; and second, whether the statute, if so interpreted, is constitutional.” *Id.* The constitutional challenge was based on the argument that the immigration laws allowing sponsorship of only opposite-sex spouses violated the Equal Protection Clause “because it discriminate[d] against them on the bases of sex and homosexuality.” *Id.* at 1041.

31. *Id.*

Ninth Circuit Court of Appeals first determined that it was unnecessary to their decision whether or not the Colorado court would validate the marriage.<sup>32</sup> The court determined that Congress intended only heterosexual marriages to be recognized for immigration purposes and this was constitutionally valid.<sup>33</sup>

It was not until 1990 that homosexuality was removed from the list of permissible bases for denial of admission into the United States.<sup>34</sup>

### *B. Current Immigration Options Available for Same-Sex Partners*

#### *1. The B-2 Visa Category*

Currently there are no methods for same-sex partners to sponsor each other for immigration purposes. Oddly, however, same-sex marriages performed in other countries are to be treated the same as opposite-sex marriages for the purposes of non-immigrant (i.e., non-permanent) visas.<sup>35</sup> Where one partner is coming to the United States on a long-term non-immigrant visa, his or her same-sex partner may accompany him or her to the U.S. in the B-2 visa category ("travel for pleasure").<sup>36</sup> The partner on the

32. *Id.* at 1039. In determining this, the court noted that "[although] two persons contract a marriage valid under state law and are recognized as spouses by that state, they are not necessarily spouses for purposes of section 201(b) [of the INA]." *Id.* at 1040.

33. *Id.* at 1040-43. Adams and Sullivan argued that the Act, if interpreted to exclude same-sex marriages, was discriminatory and therefore violated the equal protection guarantee in the Fifth Amendment's Due Process Clause. *Id.* at 1041. The court applied a rational basis test and determined that Congress's decision to apply the INA only to heterosexual marriages did have a rational basis and thus complied with the Due Process Clause. *Id.* at 1042. Because of congressional concern for family integrity in passing the INA and because homosexual marriages "never produce offspring," are not recognized by the states, and violate "traditional and often prevailing societal mores," Congress had a rational basis in its intent to deny immigration benefits to spouses of same-sex marriages. *Id.* at 1043.

34. Prol & Weiss, *supra* note 24, at 24; *see also* Flowers, *supra* note 19, at 17 (mentioning that the statutory language, "sexual deviates," was the basis for denying admission to the United States).

35. Prol & Weiss, *supra* note 24, at 25.

36. Cable from Colin L. Powell, U.S. Secretary of State, to All Diplomatic and Consular Posts, B-2 Classification for Cohabiting Partners (July 1, 2001), *available at* [http://travel.state.gov/visa/laws/telegrams/telegrams\\_1414.html](http://travel.state.gov/visa/laws/telegrams/telegrams_1414.html); *see also* Bonnie Miluso, *Family "De-Unification" in the United States: International Law Encourages Immigration Reform for Same-Gender Binational Partners*, 36 GEO. WASH. INT'L L. REV. 915, 923 (2004).

B-2 visa cannot work, though the visa may be renewed an unlimited amount of times, so long as the partner's non-immigrant visa remains valid.<sup>37</sup> Because it is only available to same-sex partners of non-immigrant visa holders, and therefore foreign nationals, this option is not available to same-sex partners of U.S. citizens or permanent residents.<sup>38</sup> This arguably discriminates against U.S. citizens and permanent residents because the United States has chosen to give certain rights to foreign national same-sex partners that it does not grant to its own citizens.<sup>39</sup>

## 2. *Asylum*

Homosexual individuals may be able to apply for asylum in the U.S. on the basis of fear of persecution for their sexual orientation.<sup>40</sup> This was first allowed in 1990 under INA section 101(a)(42),<sup>41</sup> but was not seen in practice until a 1994 BIA decision approved granting relief from deportation to a homosexual man persecuted in his home country of Cuba because of his sexual orientation.<sup>42</sup>

## 3. *Other Options*

In general, there are many ways for individual foreign nationals to immigrate to the United States. Each partner may be able to separately procure his or her own visa through sponsorship by another family member,<sup>43</sup> through an employer,<sup>44</sup> or by winning the diversity-visa lottery.<sup>45</sup> However, there are many potential problems with these various alternatives. For example, because the visas would not be issued conjunctively, the partners may not be able to legally stay the same length of time, or one partner may be able to secure permanent residency while the other partner's visa expires.

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37. Miluso, *supra* note 36, at 923-24.

38. *Id.* at 924.

39. *Id.* at 943-44.

40. *Id.* at 922.

41. *Id.* at 922-23.

42. Prol & Weiss, *supra* note 24, at 24.

43. *See generally*, INA § 203(a), 8 U.S.C. § 1153(a) (2000).

44. *See* INA § 203(b), 8 U.S.C. § 1153(b).

45. *See* INA § 203(c), 8 U.S.C. § 1153(c).



C. *The Context of the Permanent Partners Immigration Act*

Representative Jerrold Nadler of New York first introduced the PPIA in the U.S. House of Representatives on February 14, 2000.<sup>46</sup> Representative Nadler subsequently re-introduced the bill on February 14, 2001,<sup>47</sup> again on February 13, 2003, as H.R. 832,<sup>48</sup> and most recently on June 21, 2005, as H.R. 3006.<sup>49</sup> The bill's title is "To amend the Immigration and Nationality Act to provide a mechanism for United States citizens and lawful permanent residents to sponsor their permanent partners for residence in the United States, and for other purposes."<sup>50</sup> Also on June 21, 2005, Senator Patrick Leahy of Vermont introduced the companion bill in the Senate.<sup>51</sup> Currently, the PPIA has garnered eighty-four cosponsors in the House of Representatives and ten cosponsors in the Senate.<sup>52</sup>

The PPIA comes at a time when there is great controversy and debate in the United States on the issue of same-sex marriages and civil unions in general. The country has been torn in two different directions—one side arguing for full recognition of same-sex unions as marriages, while conservative groups responding with proposals that limit marriage by definition to a union between a man and a woman.<sup>53</sup> During the past decade, several states have begun to legally recognize same-sex unions and examine granting same-sex partners the right to marry, with conservative groups strongly opposing these developments.<sup>54</sup> Same-sex marriage was

46. Miluso, *supra* note 36, at 916; *see also* Susan Hazeldean & Heather Betz, *Years Behind: What the United States Must Learn About Immigration Law and Same-Sex Couples*, 30 HUM. RTS. 17, Summer 2003, at 18.

47. Miluso, *supra* note 36, at 916.

48. *Id.*; *see also* Hazeldean & Betz, *supra* note 46, at 18.

49. H.R. 3006, 109th Cong. (2005).

50. 151 CONG. REC. S6917 (daily ed. June 21, 2005) (statement of Sen. Leahy).

51. S. 1278, 109th Cong. (2005).

52. Information on the status of the PPIA in the House of Representatives, including the number and the names of all the cosponsors and the date they signed, is available via <http://thomas.loc.gov>.

53. Demian, Partners Task Force for Gay and Lesbian Couples, *State Legislative Reactions to Suits for Same-Sex Marriage*, Nov. 21, 2005, <http://www.buddybuddy.com/t-line-2.html>.

54. *See* Brause v. Bureau of Vital Statistics, No. 3AN-95-6562 CI, 1998 WL 88743, at \*1 (Alaska Super. Ct. Feb. 27, 1998); Baehr v. Miike, No. 91-1394, 1996 WL 694235, at \*22 (Haw. Cir. Ct. Dec. 3, 1996); Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 969 (Mass. 2003); Baker v. State, 744 A.2d 864, 867 (Vt. 1999).

described as the number one issue in the November 2004 elections in terms of the number of states that addressed it.<sup>55</sup> Eleven states carried ballot initiatives to amend their constitutions to ban same-sex marriages.<sup>56</sup> Additionally, although federal recognition of marriage is currently limited to “a legal union between one man and one woman,”<sup>57</sup> some members of the current administration and Congress have proposed to amend the U.S. Constitution to include this definition as well.<sup>58</sup>

While immigration law has evolved, it has not kept pace with other nations around the world, many of which recognize same-sex partnerships for immigration purposes. Current U.S. immigration laws allow U.S. citizens, permanent residents, and even temporary immigrants, to apply to have their spouse join them in the U.S. in nearly all immigrant and non-immigrant visa categories.<sup>59</sup> This right does not extend to same-sex partners who are in a committed long-term relationship, joined by a civil union, or even married under the law of another country.

Although “spouse” is not defined in the INA,<sup>60</sup> it has been limited by case law to mean an individual of the opposite sex.<sup>61</sup> Additionally, the Defense of Marriage Act (DOMA), passed in 1996, provides that the word “marriage” in any U.S. government regulation means only a heterosexual couple.<sup>62</sup>

55. Crary, *supra* note 1.

56. *Id.* These states are Arkansas, Georgia, Kentucky, Michigan, Mississippi, Montana, North Dakota, Ohio, Oklahoma, Oregon, and Utah. *Id.*

57. The Defense of Marriage Act, 1 U.S.C. § 7 (1996).

58. H.R.J. Res. 39, 109th Cong. (2005). The amendment would read, Marriage in the United States shall consist only of a legal union of one man and one woman . . . . No court of the United States or of any State shall have jurisdiction to determine whether this Constitution or the constitution of any State requires that the legal incidents of marriage be conferred upon any union other than a legal union between one man and one woman . . . . No State shall be required to give effect to any public act, record, or judicial proceeding of any other State concerning a union between persons of the same sex that is treated as a marriage, or as having the legal incidents of marriage, under the laws of such other State.

*Id.*; see also S.J. Res. 1, 109th Cong. (2005).

59. See, e.g., 8 U.S.C. § 1153(a) (2000) (addressing the preference in allocating visas to family-sponsored immigrants).

60. The only mention of the meaning of “spouse” in the general provisions of the INA is to note that it is to exclude spouses of “proxy” marriages. INA § 101(a)(35), 8 U.S.C. § 1101(a)(35) (2000).

61. *Adams v. Howerton*, 673 F.2d 1036, 1040 (9th Cir. 1982), *cert. denied*, 458 U.S. 1111 (1982).

62. 1 U.S.C. § 7 (2000).

The issue of immigration benefits for same-sex partners was most recently addressed by the introduction of the PPIA in the House of Representatives by Representative Jerrold Nadler on June 21, 2005.<sup>63</sup> The PPIA would not create a “marriage” for same-sex couples but would recognize same-sex partners as spouses in the United States, if such partners are in a committed, long-term relationship but unable to legally marry.<sup>64</sup> Activists against the bill and against recognition of same-sex partnerships for immigration purposes have argued that allowing same-sex partnerships could potentially unleash a flood of sham marriages.<sup>65</sup> It has also been argued, however, that *not* allowing same-sex recognition for immigration has encouraged sham marriages by same-sex couples seeking a way to stay together in the U.S.<sup>66</sup>

#### *D. Current Trends in the United States on Same-Sex Marriage*

Many U.S. laws on same-sex marriages and partnerships and changes to these laws are in a reactionary cycle. As activists for same-sex couples have made headway challenging past and current laws while seeking legal recognition of same-sex unions, state and federal lawmakers have responded by denying or banning recognition.<sup>67</sup> Conservative groups have also challenged the efforts of activists for same-sex couples, making it sometimes seem like “two steps forward, one step back” for the activists of same-sex rights.

##### *1. State Domestic Partnership Laws and Other Developments*

Several municipalities in the U.S. have chosen to recognize same-sex partnerships by creating Domestic Partnership registration.<sup>68</sup> The registry in some cities is symbolic only, while in others, registration confers limited partnership rights that are

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63. H.R. 3006, 109th Cong. § 1(a)(2) (2005).

64. *Id.* § 2(2). The definition of a “Permanent Partnership” under the PPIA is essentially how marriage is commonly defined and includes requirements of majority age, financial interdependence, and non-blood relation, among others. *Id.*

65. Dueñas, *supra* note 20, at 826-27.

66. *Id.*

67. Demian, *supra* note 53.

68. Dueñas, *supra* note 20, at 837. Additionally, even the U.S. Congress recognizes its members’ same-sex partners by granting them the same rights as its members’ married spouses. *Id.*

commonly available to opposite-sex spouses.<sup>69</sup>

Several same-sex couples have challenged state laws seeking benefits and legal recognition.<sup>70</sup> While results have been mixed, some courts have recognized the discriminatory effects of state laws and the rights of same-sex partners to receive benefits and have their unions recognized.<sup>71</sup>

Most recently, the Massachusetts Supreme Court held that “barring an individual from the protections, benefits, and obligations of civil marriage solely because that person would marry a person of the same sex violates the [Massachusetts] Constitution.”<sup>72</sup> Consequently, same-sex marriages are now legal in Massachusetts, but only for Massachusetts residents.<sup>73</sup> It remains to be seen whether this decision will be countered by a constitutional amendment prohibiting recognition of such marriages.<sup>74</sup> The Vermont legislature legally recognized same-sex partnerships by creating the “Civil Union,” after its supreme court held that the state legislature needed to enact laws to provide benefits to same-sex couples.<sup>75</sup> Civil Unions of same-sex couples were recently recognized in Connecticut, which enacted legislation on civil unions without pressure from its courts.<sup>76</sup>

Other similar cases have not fared well when put before the legislature or the popular vote. Hawaii had success in the case of *Baehr v. Miike*,<sup>77</sup> which held that “[t]he sex-based classification . . . is

69. *Id.*

70. *Id.* at 838-40.

71. *Id.*

72. *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 969 (Mass. 2003).

73. A 1913 law has been used to bar out-of-state same-sex couples from being able to get married in Massachusetts if the marriage would be illegal in the couple’s home state. *Court in Boston Allows a Gay Marriage Suit*, N.Y. TIMES, Feb. 24, 2005, at A17. The law has been challenged, and a case is currently pending in the Massachusetts Supreme Judicial Court. *Id.*

74. A constitutional amendment to ban same-sex marriages, and create civil unions, went before the legislature. The legislature defeated the amendment by a 157 to 39 vote on September 14, 2005. Pam Belluck, *Massachusetts Rejects Bill to Eliminate Gay Marriage*, N.Y. TIMES, Sept. 15, 2005, at A14. The amendment is still to be submitted to a statewide vote in 2006. Demian, *supra* note 53.

75. VT. STAT. ANN. tit. 15, §§ 1201-1207 (2004); *Baker v. State*, 744 A.2d 864 (Vt. 1999).

76. William Yardley, *Day Arrives for Recognition of Gay Unions in Connecticut*, N.Y. TIMES, Oct. 1, 2005, at B1. It remains to be seen whether Vermont and Connecticut will legally recognize civil unions performed in the other state. *Id.* Same-sex marriages performed in neighboring Massachusetts are not recognized as civil unions in Connecticut. *Id.*

77. *Baehr v. Miike*, No. 91-1394, 1996 WL 694235 (Haw. Cir. Ct. Dec. 3,

unconstitutional and in violation of the equal protection clause of . . . the Hawaii Constitution.”<sup>78</sup> Hawaiian legislators responded in 1997 by creating “Reciprocal Beneficiaries” in an attempt to circumvent the *Baehr* ruling.<sup>79</sup> In the November 1998 elections, the ballot contained a constitutional amendment to nullify the *Baehr* ruling.<sup>80</sup> The amendment was adopted by a majority of voters.<sup>81</sup>

In February 1998, Alaska also had a favorable court decision regarding same-sex marriage.<sup>82</sup> However, in events similar to those in Hawaii, the legislature responded quickly by placing on the ballot a constitutional amendment to ensure marriage could only be between a man and a woman.<sup>83</sup> The amendment passed by a sixty-eight to thirty-two percent margin.<sup>84</sup>

## 2. *The Defense of Marriage Act*

President Bill Clinton signed DOMA into law in 1996.<sup>85</sup> DOMA provides that in interpreting the meaning of federal laws, “marriage means only a legal union between one man and one woman as husband and wife,” and that “the word ‘spouse’ refers only to a person of the opposite sex who is a husband or a wife.”<sup>86</sup> While DOMA remains part of U.S. law, it seems doubtful that the United States will recognize same-sex marriages performed in other countries.<sup>87</sup> So far, forty-one states have passed versions of DOMA.<sup>88</sup>

1996).

78. *Id.* at \*22.

79. Demian, *supra* note 53.

80. WILLIAM N. ESKRIDGE, JR., EQUALITY PRACTICE—CIVIL UNIONS AND THE FUTURE OF GAY RIGHTS 39 (2002).

81. *Id.* at 40.

82. *Brause v. Bureau of Vital Statistics*, No. 3AN-95-6562 CI, 1998 WL 88743, at \*1 (Alaska Super. Ct. Feb. 27, 1998).

83. ESKRIDGE, *supra* note 80, at 40-41. The legislature placed the amendment on the ballot in November 1998. *Id.*

84. *Id.* at 42. The same-sex partners from the 1998 *Brause* case then challenged the validity of the statute denying their right to be married on the grounds that they were denied benefits available only to married people. *Brause v. State*, 21 P.3d 357, 358-59 (Alaska 2001). The court affirmed the lower court’s dismissal of the case on the grounds that it was not ripe because the plaintiffs did not show they were harmed by denial of any benefits. *Id.*

85. Mara Schulzetenberg, *U.S. Immigration Benefits for Same Sex Couples: Green Cards for Gay Partners?* 9 WM. & MARY J. WOMEN & L. 99, 116 (2002) (discussing the legal and social implications of DOMA on same-sex couples immigrating to the United States).

86. 1 U.S.C. § 7 (1996).

87. See *In re Kandau*, 314 B.R. 123 (Bankr. W.D. Wash. 2004) (dismissing suit in Bankruptcy court by a lesbian couple who was married in Canada and filed a joint

Several of these states have gone even further and amended their state constitutions to also define marriage as between a man and a woman.<sup>89</sup> Eleven states had similar measures to ban same-sex marriage on their ballots for the November 2004 elections.<sup>90</sup> The measures passed in all eleven states.<sup>91</sup>

It remains to be seen whether challenges to DOMA will succeed. Legislatively, DOMA has been fought by the introduction of bills such as H.R. 2677 in the last congressional session.<sup>92</sup> The bill, titled the “State Regulation of Marriage Is Appropriate Act,” proposed to “amend title 1, United States Code, to eliminate any Federal policy on the definition of marriage.”<sup>93</sup> The bill was referred to the House subcommittee on the Constitution; however, it gained only four signatures.<sup>94</sup> To date, it has not been re-introduced in the current congressional session.

Additional challenges to DOMA could be brought in the court

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chapter 7 bankruptcy petition due to improper joint filing of unmarried individuals); *see also* Lockyer v. City of San Francisco, 95 P.3d 459 (Cal. 2004) (holding that the mayor of San Francisco exceeded his authority when he allowed the city to issue marriage licenses to homosexual couples; the court declared these marriage licenses invalid).

88. Demian, *supra* note 53. The states with laws to prevent recognition of same-sex marriages in other states are (with the date of the law) Alabama (1998), Alaska (1998), Arizona (1996), Arkansas (1997), California (2000), Colorado (2000), Delaware (1996), Florida (1997), Georgia (1996), Hawaii (1998), Idaho (1996), Illinois (1996), Iowa (1998), Indiana (1997), Kansas (1996), Kentucky (1998), Louisiana (1999), Maine (1997), Michigan (1996), Minnesota (1997), Mississippi (1997), Missouri (2004), Montana (1997), Nebraska (2000), Nevada (2002), New Jersey (2001), New York (2001), North Carolina (1996), North Dakota (1997), Ohio (2001), Oklahoma (1996), Oregon (2004), Pennsylvania (1996), South Carolina (1996), South Dakota (1996), Tennessee (1996), Texas (2003), Utah (2004), Virginia (2004), Washington (1998), and West Virginia (2000). *Id.*

89. *Id.* (including California, Colorado, Florida, Kansas, Louisiana, and Mississippi).

90. Sarah Kershaw & James Dao, *Voters in 10 of 11 States are Seen as Likely to Pass Bans of Same-Sex Marriages*, N.Y. TIMES, Sept. 28, 2004, at A14. These eleven states were Arkansas, Georgia, Kentucky, Michigan, Mississippi, Montana, North Dakota, Ohio, Oklahoma, Oregon, and Utah (the initiative in Oregon was not expected to pass, thus the article’s title). *Id.*

91. James Dao, *Same-Sex Marriage Issue Key to Some G.O.P. Races*, N.Y. TIMES, Nov. 4, 2004, at P4.

92. State Regulation of Marriage is Appropriate Act, H.R. 2677, 108th Cong. (2003). Representative Frank of Massachusetts introduced this bill in the U.S. House of Representatives on July 9, 2003. *Id.*

93. *Id.*

94. *Id.* (gaining the signatures of Representative Waxman of California, Representative Sabo of Minnesota, Representative Blumenauer of Oregon, and Representative Israel of New York).

system. One challenge to DOMA is that it is vulnerable on constitutional grounds.<sup>95</sup> Opponents of DOMA argue that it violates the U.S. Constitution's Full Faith and Credit clause.<sup>96</sup> This is based on the idea that Congress may pass laws on the effect of states' legal judgments, so long as Congress does not try to bypass Article IV of the U.S. Constitution, which requires full faith and credit be given to those judgments.<sup>97</sup> Challenges also include that federal and state DOMAs violate equal protection clauses.<sup>98</sup> A recent example of this issue is illustrated by the Massachusetts Supreme Court declaring its state constitution prohibited denying marriage licenses to same-sex couples.<sup>99</sup> Additionally, a recent decision by a Washington state court held that the state's DOMA violated the Washington Constitution's privileges and immunities clause.<sup>100</sup> Significantly, under the federal DOMA, other states

95. See, e.g., Prol & Weiss, *supra* note 24, at 26-27.

96. *Id.* at 26-27; see also ESKRIDGE, *supra* note 80, at 26-32.

97. Miluso, *supra* note 36, at 920-21. The Full Faith and Credit Clause of the U.S. Constitution states, "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof." U.S. CONST. art. IV, § 1.

98. Prol & Weiss, *supra* note 24, at 26.

99. Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941 (Mass. 2003). Apparently the Massachusetts Senate also requested the supreme court to issue an opinion on the constitutionality of a bill prohibiting same-sex marriages (but allowing civil unions). Opinions of the Justices to the Senate, 802 N.E.2d 565 (Mass. 2004). The supreme court stated that the proposed Senate bill violated the equal protection and due process clauses of the Massachusetts Declaration of Rights, was unconstitutional, and further, that the portion of the bill rendering it constitutional was not severable. *Id.* at 572. "The bill maintains an unconstitutional, inferior, and discriminatory status for same-sex couples, and the bill's remaining provisions are too entwined with this purpose to stand independently." *Id.* This opinion has been criticized nationally as beyond the scope of the Judiciary. *Scalia: Some Judges Display too Much Power*, ASSOCIATED PRESS, AP ONLINE, Sept. 29, 2004. And while the issue of same-sex marriage was not specifically mentioned, Justice Scalia indicated that some matters are "too fundamental" to be resolved by judges. *Id.*

100. Castle v. State, No. 04-2-00614-4, 2004 WL 1985215, at \*16 (Wash. Super. Ct. Sept. 7, 2004). In so holding the court stated, "[f]or the government this is not a moral issue. It is a legal issue . . . . What fails strict scrutiny here is a government approved civil contract for one class of the community not given to another class of the community." *Id.* at \*17. Courts in other jurisdictions, however, have upheld prohibitions against same-sex marriages as not contrary to the equal protection guarantees of a state constitution. *E.g.*, Lewis v. Harris, No. MER-L-15-03, 2003 WL 23191114, at \*28 (N.J. Super. Ct. Law Div. Nov. 5, 2003) (holding that New Jersey's prohibition against same-sex marriage is not contrary to the equal protection clause of the state and federal constitutions and commending the legislature to consider the expanded rights afforded to same-sex couples in other

would not be obligated to recognize a same-sex marriage that took place in Massachusetts.<sup>101</sup>

Despite general consensus that DOMA violates U.S. constitutional provisions,<sup>102</sup> the U.S. Supreme Court has yet to hear a case on this issue in the time since DOMA was enacted in 1996.<sup>103</sup> Yet another proposed bill would amend the federal law to limit federal court jurisdiction over questions arising under DOMA.<sup>104</sup>

Additionally, on March 17, 2005, a joint resolution was proposed in the U.S. House of Representatives to amend the U.S. Constitution to limit marriage in the United States to a union between one man and one woman.<sup>105</sup> The amendment would also limit construction of any state constitution to require recognition of marriage, or any other similar union, to only those between one man and one woman.<sup>106</sup>

#### *E. What Other Literature Has Suggested*

Other analyses of this issue have led to varying conclusions. It has been suggested that the PPIA could be altered to conform more to the requirements set forth by British law.<sup>107</sup> Another proffered solution is the adoption of the Canadian Model of allowing same-sex partners immigration benefits on humanitarian grounds.<sup>108</sup> Alternatively, other suggestions have been to adopt regulations holding same-sex partnerships to the same standards as common-law spouses<sup>109</sup> and having the USCIS establish a registry for same-sex partners for immigration purposes.<sup>110</sup> One commentator has also stated that repealing or amending DOMA

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jurisdictions).

101. Prol & Weiss, *supra* note 24, at 25.

102. See ESKRIDGE, *supra* note 80, at 32-39; Miluso, *supra* note 36, at 920-22; Prol & Weiss, *supra* note 24, at 26-27; Demian, *supra* note 53.

103. Miluso, *supra* note 36, at 920-22.

104. H.R. 1100, 109th Cong. (2005).

105. H.R.J. Res. 39, 109th Cong. § 1 (2005); *see also* S.J. Res. 1, 109th Cong. (2005).

106. H.R.J. Res. 39, 109th Cong. § 2 (2005).

107. Schulzetenberg, *supra* note 85, at 115. For example, British law requires same-sex partners to document that they are in a committed relationship (cohabitating for over two years). *Id.* at 114-15.

108. *Id.*; Dueñas, *supra* note 20, at 813. The Canadian Model supports assessment of each relationship on its own merits, without a time requirement. Schulzetenberg, *supra* note 85, at 115.

109. Schulzetenberg, *supra* note 85, at 116.

110. Dueñas, *supra* note 20, at 813.



would likely render the PPIA unnecessary.<sup>111</sup>

### III. IMMIGRATION LAWS AFFECTING SAME-SEX PARTNERSHIPS IN OTHER COUNTRIES

At the time of publication, there were eighteen countries that recognized same-sex partnerships to provide immigration benefits.<sup>112</sup> These laws ranged from allowing same-sex marriages, along with nearly all the ensuing benefits that are granted to heterosexual couples, to some form of legally recognized domestic partnership, to recognition of the relationship if one person was a citizen of the country and there was extensive documentation to support the relationship.<sup>113</sup> The laws enacted in these countries demonstrate the variety of ways that countries can grant immigration benefits for same-sex partners.<sup>114</sup> The U.S. could learn from these countries to see how recognition of same-sex partnerships for immigration purposes has succeeded, and to what degree.

#### A. Immigration Through Marriage

Countries that have legalized same-sex marriages have granted same-sex couples the full economic, legal, and social benefits enjoyed by opposite-sex couples.<sup>115</sup> Immigration benefits are part of the benefits married opposite-sex couples are granted, and therefore the benefits have also been granted to married same-sex couples in those countries.<sup>116</sup> Thus, married same-sex couples

111. See Desiree Alonso, *Immigration Sponsorship Rights for Gay and Lesbian Couples: Defining Partnerships*, 8 CARDOZO WOMEN'S L.J. 207, 218 (2002).

112. These seventeen countries are Australia, Belgium, Brazil, Canada, Denmark, Finland, France, Germany, Iceland, Israel, the Netherlands, New Zealand, Norway, Portugal, South Africa, Spain, Sweden, and the United Kingdom. See Miluso, *supra* note 36, at 918 n.23; Hazeldean & Betz, *supra* note 46, at 17; Demian, Partners Task Force for Gay and Lesbian Couples, *Immigration Roundup: A Survey of Welcoming Countries*, Aug. 16, 2005, <http://www.buddybuddy.com/immigr.html>. See also Lena Ayoub & Shin-Ming Wong, *Separated and Unequal*, 32 WM. MITCHELL L. REV. 559 (2006).

113. *Infra* Part III.A.

114. *Id.*

115. See Demian, Partners Task Force for Gay and Lesbian Couples, *Netherlands Offers Legal Marriage*, Sept. 10, 2005, <http://www.buddybuddy.com/mar-neth.html>. For same-sex couples, however, overseas adoption is currently not available due to possible legal opposition from countries that do not recognize same-sex marriage. *Id.*

116. Miluso, *supra* note 36, at 933.

follow the same application process as married opposite-sex partners.<sup>117</sup> These countries first allowed immigration benefits for same-sex partnerships under other programs such as domestic registered partnership laws.<sup>118</sup>

The Netherlands, Belgium, Canada, and Spain are the only countries to have legalized same-sex marriage,<sup>119</sup> and it is on this basis that foreign partners are eligible for immigration benefits.<sup>120</sup> The Netherlands was the first country in the world to legalize same sex marriage on April 1, 2001.<sup>121</sup> In the summer of 2003 Belgium also legalized same-sex marriages.<sup>122</sup> On June 30, 2005, the Spanish Parliament voted to legalize gay marriage,<sup>123</sup> and that same year Canada's legislature legalized gay marriage on July 19.<sup>124</sup>

There are some limitations on same-sex marriage in these countries with regard to couples seeking immigration benefits. In the Netherlands, same-sex marriage is available only to citizens and legal residents.<sup>125</sup> However, legal residents may be nationals of foreign countries and legal residency is not difficult to establish.<sup>126</sup> In Belgium, all that is required is that one spouse in the foreign born same-sex couple has lived in Belgium for at least three months.<sup>127</sup> Spain currently appears to have imposed no restrictions on its immigration laws for same-sex married partners.<sup>128</sup>

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117. *See id.*

118. Hazeldean & Betz, *supra* note 46, at 17-18.

119. Renwick McLean, *Spain Legalizes Gay Marriage; Law is Among the Most Liberal*, N.Y. TIMES, July 1, 2005, at A9.

120. *See* Miluso, *supra* note 36, at 933.

121. Hazeldean & Betz, *supra* note 46, at 17.

122. Miluso, *supra* note 36, at 933; *see also* Hazeldean & Betz, *supra* note 46, at 17.

123. McLean, *supra* note 119.

124. *World Briefing Americas: Canada: Gay Marriage Approved*, N.Y. TIMES, July 21, 2005, at A6. Since mid-2003 several provinces in Canada have legalized same-sex marriage. Colin Campbell, *World Briefing Americas: Canada: Fourth Province Legalizes Gay Marriage*, N.Y. TIMES, Sept. 17, 2004, at A6. In late 2004, provincial courts in British Columbia, Manitoba, Nova Scotia, Ontario, Quebec, Saskatchewan, and the Yukon Territory allowed same-sex marriage. Colin Campbell, *World Briefing Americas: Canada: Another Province Allows Gay Marriage*, N.Y. TIMES, Nov. 6, 2004, at A8.

125. Demian, *supra* note 115.

126. *Id.* Residency can be established by using a Dutch address for four months. *Id.*

127. Demian, Partners Task Force for Gay and Lesbian Couples, *Belgium Offers Legal Marriage*, July 22, 2005, <http://www.buddybuddy.com/mar-belg.html>.

128. Ayoub & Wong, *supra* note 112, at 576 n.62. Initially it appeared as though Spain was going to restrict same-sex marriage to foreign partners whose country of citizenship recognized same sex-marriage. Demian, Partners Task

Canada has allowed immigration benefits where both partners are foreign nationals, while in most other countries at least one of the partners must be a citizen or permanent resident of the country.<sup>129</sup> The issue of same-sex marriage in Canada was fully resolved on July 20, 2005, when the Civil Marriage Act legalized same-sex marriage.<sup>130</sup> Pursuant to this Act, the Canadian government adopted an interim policy on sponsoring the same-sex partner as a spouse under the family class.<sup>131</sup>

The interim policy states that Canadian citizens and permanent residents are able to sponsor their same-sex partner “as a spouse” where they have been married in Canada and were issued a marriage certificate by a Canadian province or territory.<sup>132</sup> Additionally, this interim policy notes that same-sex couples who marry abroad, where one of the partners is a Canadian citizen or permanent resident, may be eligible to qualify for immigration benefits as common-law or conjugal partners.<sup>133</sup>

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Force for Gay and Lesbian Couples, *Spain Offers Legal Marriage*, August 8, 2005, <http://www.buddybuddy.com/mar-spai.html>. However, on August 8, 2005, Spain’s Justice Ministry published a ruling that allows marriage to a same-sex foreign partner regardless of whether his or her country of citizenship recognizes same-sex marriage. *Id.*

129. Dueñas, *supra* note 20, at 831. Canada appears to have some of the most liberal immigration laws with regards to same-sex partnerships. *Id.* Historically, Canada creatively allowed for same-sex partners to apply for residency under a humanitarian and compassionate ground exception within the Canadian immigration laws. Hazeldean & Betz, *supra* note 46, at 18. Later, however, same-sex partners became included under the family category. *Id.*

130. Citizenship and Immigration Canada: Family Class Immigration, <http://www.cic.gc.ca/english/sponsor/index.html>.

131. *Id.* This interim policy is in place while the Canadian immigration service determines how the Civil Marriage Act, legalizing same-sex marriage in Canada, will impact its immigration programs. *Id.* Under the Civil Marriage Act, the Canadian parliament noted that allowing same sex couples access to civil marriages is the only way the Canadian government can respect the rights of such couples and that if denied access, it would violate their rights under the Canadian Charter of Rights and Freedoms. Civil Marriage Act, 2005 S.C., ch. 33 s. 2 (Can.). Under the Act, religious organizations are under no legal obligation to perform same-sex marriages. *Id.*

132. Citizenship and Immigration Canada: Spouses, Common-Law Partners and Conjugal Partners, <http://www.cic.gc.ca/english/sponsor/familymembers.html> (last visited Nov. 9, 2005). The marriage certificates issued by the province or territory must be dated on or after the date that same-sex marriage was legalized within that province or territory, or after the passage of the Civil Marriage Act on July 20, 2005. *See id.*

133. *Id.*

### *B. Immigration Through Registered Partnerships*

Several countries have granted legal recognition to same-sex partnerships through various schemes different from marriage.<sup>134</sup> In these countries, partners may enter into a legally recognized relationship that may be similar to or even the same as a marriage, but is termed something else.<sup>135</sup> What Americans may know as a “Civil Union” is relatively similar to the “Registered Partnership” in several European countries.<sup>136</sup> Sometimes the benefits same-sex partners may receive under these plans are less than those granted to married opposite-sex couples, but they often include immigration benefits.<sup>137</sup> The following discussion on these types of immigration benefits for same-sex partners is separated into two categories: countries with Registered Partnerships offering the same benefits to partners as a marriage, and countries with Registered Partnerships offering limited benefits.

#### *1. Registered Partnerships with Full Marriage Benefits*<sup>138</sup>

Denmark was the first country to give same-sex partnerships benefits similar to those from marriage.<sup>139</sup> In May 1989, the Danish legislature voted to enact the Danish Registered Partnership Act (DRPA).<sup>140</sup> The DRPA was effective October 1989 and granted same-sex partners who registered most of the same benefits and responsibilities as those granted to opposite-sex married couples.<sup>141</sup> Immigration benefits in Denmark are available to same-sex couples on this basis.<sup>142</sup> Generally, the process to apply for a registered partner to immigrate is the same or similar to that for opposite-sex married couples.<sup>143</sup> Typically, though, at least one partner must be

134. ESKRIDGE, *supra* note 80, at 87-97.

135. *Id.*

136. *Id.*

137. Hazeldean & Betz, *supra* note 46, at 17.

138. The countries in this category are Denmark, Finland, Iceland, Norway and Sweden. *Id.*

139. *Id.*

140. ESKRIDGE, *supra* note 80, at 89.

141. *Id.* However, rights regarding adoption and artificial insemination were withheld. *Id.* Also, at least one of the partners had to be a citizen and permanent resident of Denmark. *Id.*

142. Hazeldean & Betz, *supra* note 46, at 17.

143. See, e.g., Directorate of Immigration, *EU Citizens and Equivalent Persons: Family Member's Right of Residence in Finland*, <http://www.uvi.fi/netcomm/content.asp?path=8,2472,2492> (last visited Nov. 21, 2005). “Persons of the same sex who have registered their partnership are considered spouses.” *Id.*

a citizen of one of these countries to apply for immigration benefits for a same-sex partner.<sup>144</sup> Additionally, same-sex partners may be eligible to receive immigration benefits as cohabitants, if at least one of the partners is a citizen of that country and the partners show proof they have lived together for at least two years.<sup>145</sup>

## 2. *Registered Partnerships with Limited Benefits*

France, Germany, and Portugal have also enacted schemes similar to the Registered Partnership Acts, which also allow for immigration benefits; otherwise, the schemes are less comprehensive.<sup>146</sup> In November 2000, the Registered Life Partnership Law was passed in Germany.<sup>147</sup> A statute passed in March 2001 created a "Registered Union" in Portugal.<sup>148</sup>

On October 13, 1999, France enacted the Pacte Civil de Solidarité (PACS) which is "a contract concluded between two physical persons who have reached the age of majority, of different or the same gender, for the purposes of organizing their life in common."<sup>149</sup> The PACS is not meant to be the same as marriage,<sup>150</sup> but for immigration purposes in procuring a residence permit for a foreign partner, a PACS is a determinative element.<sup>151</sup>

## C. *Same-Sex Partnerships Recognized for Immigration Purposes*

Several countries that do not recognize same-sex partnerships through other legal schemes have otherwise been successful in granting immigration benefits to same-sex partners.<sup>152</sup> Application requirements under these plans may be more stringent than requirements for opposite-sex married couples. This may be due to the difficulty in being able to provide definitive proof of the

144. Demian, *supra* note 112.

145. See, e.g., Directorate of Immigration, *supra* note 143. This category would also be available to opposite-sex couples who are unmarried. *Id.*

146. Hazeldean & Betz, *supra* note 46, at 17-18.

147. *Id.*

148. *Id.* at 18.

149. Frédéric Martel, *The PACS—A Civil Solidarity Pact*, July 2001, <http://www.info-france-usa.org/atoz/pacs.asp>.

150. Hazeldean & Betz, *supra* note 46, at 17. Entering into a PACS does not change civil status; a person is still considered to be "single," not "married." *Id.* Additionally, it is easier to terminate the relationship because no formal actions such as divorce proceedings are required. *Id.*

151. Martel, *supra* note 149.

152. Hazeldean & Betz, *supra* note 46, at 18.

relationship, which married couples are able to provide with a valid marriage license. In general, under these types of immigration laws, at least one partner must be a citizen or permanent resident of the country, the relationship must have existed for at least a year (sometimes two) prior to the application for benefits, and they must live together. Another feature of this type of recognition is the creation of a distinct category under the immigration laws. Most of these countries have created a subset category specifically for these kinds of relationships.

The “Interdependent Partner” category under Australia’s laws grants a same-sex partner immigration benefits.<sup>153</sup> This category is generally similar to the “Partner” category including spouses.<sup>154</sup> Immigration under the “Interdependent Partner” category is only available to same-sex foreign national partners of Australian citizens or permanent residents, or eligible New Zealand citizens.<sup>155</sup> Both partners must be at least eighteen years of age, be in an exclusive relationship, and plan to continue in the relationship, live together, or have been together for at least twelve months prior to submitting an application.<sup>156</sup> Immigration under this category involves a two-stage application process.<sup>157</sup> The first stage involves the grant of a temporary visa;<sup>158</sup> the second stage of granting the

153. Australian Government, Dep’t of Immigration and Multicultural and Indigenous Affairs, *Part 1: Interdependency Visa*, [http://www.immi.gov.au/migration/family/partners/part1\\_interdependency.htm](http://www.immi.gov.au/migration/family/partners/part1_interdependency.htm) (last updated Oct. 27, 2005) [hereinafter *Interdependency Visa*]. While the interdependent relationship category includes same-sex couples, it is not exclusive of other heterosexual relationships. *Id.*

154. Miluso, *supra* note 36, at 930; *see also* Australian Government, Department of Immigration and Multicultural and Indigenous Affairs, *Family Stream Migration—Partners* (2004), <http://www.immi.gov.au/facts/30partners.htm>.

155. *Interdependency Visa*, *supra* note 153. Thus, in situations where two foreign nationals wish to immigrate together to Australia, they will be unable to do so together unless they qualify under other categories. *Id.*

156. *Id.* The cohabitation requirement may be waived on compelling or compassionate grounds if the partners can demonstrate that they were not able to live together, such as if they lived in a country that did not legally permit them to live together. Australian Government, Dep’t of Immigration and Multicultural and Indigenous Affairs, *Australian Immigration Fact Sheet—One Year Relationship Requirement* (2004), <http://www.immi.gov.au/facts/35relationship.htm>.

157. *Interdependency Visa*, *supra* note 153.

158. *Id.* Stage one involves an assessment of the relationship considering the factors mentioned in this section and may also include an interview. *See id.* A medical examination is also required, in addition to providing “character clearances.” *Id.* The temporary visa will be effective while the application for a permanent visa is pending, generally about two years. *Id.*

permanent visa generally begins two years later.<sup>159</sup>

Under the “Family” category of New Zealand’s Immigration Service, same-sex partners are eligible for immigration benefits.<sup>160</sup> The “Family” category also includes opposite-sex married spouses, in addition to common-law spouses.<sup>161</sup> At least one of the partners must be a New Zealand citizen or resident, who then becomes the sponsor of the same-sex foreign national partner.<sup>162</sup>

In 1997 the United Kingdom began allowing same-sex partners immigration benefits as “unmarried partners.”<sup>163</sup> Under the “Unmarried Partners Rule,” a foreign national same-sex partner of a U.K. citizen or resident can immigrate or stay in the U.K.<sup>164</sup> The couple must prove three primary requirements.<sup>165</sup> First, the couple must show that the relationship has existed for two or more years and that the relationship is like a marriage.<sup>166</sup> Secondly, the relationship must be exclusive of other relationships, and the couple must live together.<sup>167</sup> Finally, the couple must be financially able to provide for the foreign national partner without receiving any public assistance.<sup>168</sup>

#### D. *The Unique Case of Brazil*

On December 12, 2003, Brazil’s National Council on Immigration determined that it would recognize same-sex unions from other countries for the purposes of granting immigration

159. *Id.* At the second stage, eligibility for a permanent visa is based on evidence that the relationship is “genuine and continuing.” *Id.* The couple may be interviewed and if the partner has been living in Australia for over a year, police clearance is required. *Id.* If the partner has lived elsewhere police clearances from those countries may also be required. Australian Government, Dep’t of Immigration and Multicultural and Indigenous Affairs, *General Requirements for Partner Migration*, [http://www.immi.gov.au/migration/family/partners/part2\\_general.htm](http://www.immi.gov.au/migration/family/partners/part2_general.htm) (last updated Oct. 27, 2005). A waiver of stage one’s two-year wait may be granted if the same-sex partners have been in the relationship for five years when they apply under the Interdependent Partner Category. *Interdependency Visa*, *supra* note 153.

160. Dueñas, *supra* note 20, at 830.

161. *Id.*

162. Demian, *supra* note 112. The requirement that at least one of the partners is a New Zealand citizen or resident also pertains to couples in a heterosexual relationship. *Id.*

163. Miluso, *supra* note 36, at 931.

164. *Id.*

165. *Id.*

166. *Id.*

167. *Id.*

168. *Id.*

benefits to foreign partners of Brazilian citizens.<sup>169</sup> Therefore, same-sex partners who obtain a marriage certificate, or comparable documentation recognizing their relationship such as proof of a civil union or registered partnership, go through the same immigration process used for sponsoring a spouse in Brazil.<sup>170</sup>

*E. Other Types of Same-Sex Partnership Recognition for Immigration Purposes*

Other countries have granted immigration benefits to same-sex partners derived from benefits granted to same-sex couples by courts.<sup>171</sup> Court-derived benefits, however, may be problematic and have little effect without some form of recognition by legislative bodies.<sup>172</sup> Benefits for same-sex couples in both Israel and South Africa are based at least in part on court decisions in those countries.<sup>173</sup> Both countries are unique in this respect from the other countries granting immigration benefits to same-sex partners.<sup>174</sup> Additionally, some people may be surprised that Israel and South Africa are included in the group of countries allowing same-sex immigration benefits. Israel and South Africa are among those countries that grant immigration benefits to same-sex partners without enacting same-sex partnership laws or allowing same-sex partners to marry.<sup>175</sup>

In 1994 Israel's High Court of Justice decided the case of *El-Al Israel Airlines v. Danilowitz* and recognized the right of a same-sex couple to receive the same employment benefits as a married couple.<sup>176</sup> Currently, Israel also allows identical immigration benefits for both same-sex couples and common-law spouses.<sup>177</sup> The procedure to apply for immigration on the basis of a same-sex partnership begins with presentation of a request and proof of the

169. Demian, *supra* note 112.

170. *Id.*

171. ESKRIDGE, *supra* note 80, at 104.

172. *Id.* at 104-07.

173. *Id.*

174. *Id.*

175. Hazeldean & Betz, *supra* note 46, at 18.

176. ESKRIDGE, *supra* note 80, at 105. The court has recognized that marriage could be limited to a union between a man and a woman. *Id.* at 106-07. However, the court has also recognized that same-sex unions are deserving of recognition and respect. *Id.*

177. *Israel Allows Partner Immigration*, CAPITAL Q, No. 403, July 21, 2000, at 4, <http://www.gaylawnet.com/news/2000/im00.htm>.



relationship at the district office of the Interior Ministry.<sup>178</sup> The foreign partner will then receive an annually renewable tourist permit.<sup>179</sup> The permit also authorizes the partner to work in Israel.<sup>180</sup> After four years, the same-sex partner can request temporary resident status.<sup>181</sup> Several years after receipt of the temporary resident status, the same-sex partner will be able to become a permanent resident and apply for citizenship.<sup>182</sup>

In 1999 South Africa allowed for sponsorship of same-sex partners for immigration benefits through judicial interpretation of its constitution in the case of *National Coalition for Gay and Lesbian Equality v. Minister of Home Affairs*.<sup>183</sup> This was done based on the incorporation of lesbian and gay rights into the South Africa Constitution.<sup>184</sup>

#### IV. IMMIGRATION LAWS AFFECTING SAME-SEX PARTNERSHIPS IN THE UNITED STATES

The United States does not currently recognize same-sex unions or marriages performed in other countries. However, there appears to be a trend abroad moving in that direction. As more countries begin to legalize same-sex marriages, how these countries will treat similar unions of other countries has yet to be seen. Countries may begin to look to Brazil for an example of how its immigration laws with respect to same-sex couples have fared. Additionally, the United States has portrayed itself as valuing the human rights and freedoms of individuals. However, continued reluctance to recognize same-sex unions performed abroad, and further discrimination against same-sex couples at home, lends support to the view of the United States as a country that preaches “do as I say, not as I do.”

##### A. *How the Proposed Permanent Partners Immigration Act Would Work*

The PPIA was introduced to correct the perceived deficiency in U.S. Immigration laws that separate loving families comprised of

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178. *Id.*

179. *Id.*

180. *Id.*

181. *Id.*

182. *Id.*

183. 2000 (1) BCLR 39 (CC) at 69 (S. Afr.).

184. Alonso, *supra* note 111, at 222-23.

same-sex partners.<sup>185</sup> In his most recent introduction of the PPIA, Senator Leahy pointed out that under current U.S. immigration laws, “committed partners of Americans are unable to use the family immigration system . . . [and] must either live apart from their partners, or leave the country if they want to live legally and permanently with them.”<sup>186</sup> Senator Leahy specifically noted the several other countries that recognize same-sex partnerships for immigration purposes to show that “the idea that immigration benefits should be extended to same-sex couples has become increasingly prevalent around the world.”<sup>187</sup> Senator Leahy made special mention of the fact that the bill retains strong prohibitions against same-sex couples committing fraud.<sup>188</sup>

Senator Kennedy also spoke out in support of the PPIA when it was introduced into the Senate in 2003.<sup>189</sup> He supported the PPIA on the grounds of family reunification.<sup>190</sup> Senator Kennedy also noted in support of the bill that “[m]ost of our major allies and trading partners already grant immigration benefits to same-sex couples.”<sup>191</sup>

The PPIA defines a “permanent partner” as  
an individual 18 years of age or older who—

- A. is in a committed, intimate relationship with another individual 18 years of age or older in which both parties intend a lifelong commitment;
- B. is financially interdependent with that other individual;
- C. is not married to or in a permanent partnership with anyone other than that other individual;
- D. is unable to contract with that other individual a marriage cognizable under this Act; and

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185. 151 CONG. REC. S6917 (daily ed. June 21, 2005) (statement of Sen. Leahy).

186. *Id.*

187. *Id.*

188. *Id.*

189. 149 CONG. REC. S10634 (daily ed. July 31, 2003) (statement of Sen. Kennedy).

190. *Id.*

191. *Id.*

E. is not a first, second, or third degree blood relation of that other individual.<sup>192</sup>

A “permanent partnership” is defined as “the relationship that exists between two permanent partners.”<sup>193</sup>

*B. Suggestions for Implementation of the Permanent Partners Immigration Act*

The PPIA would amend the INA by inserting “permanent partner” next to the term “spouse”<sup>194</sup> whenever that term appears in the INA;<sup>195</sup> and by inserting the term “permanent partnership” after “marriage,” each time that term is used.<sup>196</sup> Because by definition a permanent partner cannot legally be married in the United States,<sup>197</sup> the PPIA would not be applicable to opposite-sex couples who have the option of getting legally married.<sup>198</sup> In this way, the PPIA could be seen to place U.S. immigration laws in the same category as those of Australia, New Zealand, and the United Kingdom, which recognize same-sex partnerships for immigration purposes, but not in other contexts.

Under the PPIA, permanent partners would need to go through many of the same steps as married opposite-sex couples.<sup>199</sup> Proof that the partnership is a bona fide relationship would therefore include being interviewed by a USCIS agent and providing documentation to show the relationship is genuine, such as proof the couple lives together, photographs of the couple together, and other evidence that shows the couple is in a

192. H.R. 3006, 109th Cong. § 2(2) (2005).

193. *Id.*

194. The term “spouse” is not defined by the INA to mean partners of the opposite-sex. Dueñas, *supra* note 20, at 815-16. “[I]mmigration courts typically define a spouse as a person who is married to a petitioner where the marriage was legally valid at the time performed, is still in existence, and was not entered into solely for immigration purposes.” *Id.* (internal quotation marks and citation omitted). However, as previously noted, U.S. courts have held that same-sex marriages are invalid for immigration purposes. *Adams v. Howerton*, 673 F.2d 1036 (9th Cir. 1982), *cert. denied*, 458 U.S. 1111 (1982).

195. Hazeldean & Betz, *supra* note 46, at 18.

196. H.R. 3006 § 6.

197. *Id.* § 2(2).

198. *Id.* See generally, Demleitner, *supra* note 4, for a detailed review and analysis of how U.S. immigration law discriminates not only against same-sex couples, but also against other types of relationships such as polygamous marriages.

199. Schulzetenberg, *supra* note 85, at 114.

committed long-term relationship.<sup>200</sup>

One difference in the documentation available to same-sex couples, however, is the unavailability of a marriage certificate as definitive proof of the relationship.<sup>201</sup> Currently, foreign national partners who are in the United States on a non-immigrant (temporary) visa and who are involved with a U.S. citizen or permanent resident are advised not to seek any recognition under U.S. laws of their relationship (be it obtaining a civil union in Vermont, or seeking a marriage license in other states), as this may indicate to the USCIS that they intend to stay in the U.S. permanently and such intent could be grounds for denial of a visa.<sup>202</sup>

One option the U.S. should consider regarding recognition of marriages and civil unions performed abroad and in certain states within the U.S. is the adoption of a policy similar to the Brazilian plan.<sup>203</sup> The immigration service should consider marriages and other unions abroad as evidence of a bona fide relationship. Because of potential conflicts with DOMA, this evidence should not be considered dispositive, but it could become a factor the immigration service uses in consideration of the relationship.

Passage of the PPIA could be a great achievement for some activists in today's climate of seeming nationwide hostility towards same-sex marriages and civil unions. The PPIA would mean recognition of same-sex partnerships, the first of its kind, by the federal government. It would mean acknowledgement of these kinds of partnerships, and a validation of sorts in being worth the conferral of immigration benefits by the U.S. Government. Additionally, federal recognition for immigration purposes could pave the way for the government to recognize same-sex partnerships in other arenas of federal law.

Passage of the PPIA would also meet one of the purported goals of U.S. immigration policy, which is keeping families

200. See Hazeldean & Betz, *supra* note 46, at 18.

201. Schulzetenberg, *supra* note 85, at 114. It has been suggested that a requirement of evidence that the relationship has existed for two years, similar to the law in the U.K., may be an option the United States should consider. *Id.* at 114-15. One question, however, is whether "marriage" certificates, or other documentation of a same-sex relationship (such as the French PACS), would be admissible as proof of a bona fide relationship.

202. Demian, *supra* note 112.

203. See discussion *supra* Part III.D.

together.<sup>204</sup> Under the current laws and policy, same-sex couples, as a family unit, are kept apart.<sup>205</sup> The USCIS does not consider factors such as whether or not the couple has children. The bi-national same-sex couple is simply automatically discounted from any policy determinations on family unification.

Another argument for adoption of the PPIA is the experiences from other nations, such as the United Kingdom, that have successfully implemented immigration benefits for same-sex couples without recognizing same-sex marriage or another type of comparable union. A current benefit of the PPIA is that it does not purport to create a marriage between the same-sex partners. This method therefore is not subject to examination under State or Federal DOMAs. Drawing upon the examples set by nations such as the United Kingdom, it appears that the PPIA could be effectively enacted and implemented in the United States.

## V. CONCLUSION

It seems inevitable that the United States will need to do something in the future to change the current immigration policy disallowing recognition of same-sex partnerships. The PPIA is perhaps the best option currently available. This may be in part because it does not purport to confirm marriage of same-sex partnerships and may therefore be more palatable to supporters of state and federal DOMAs. Although many activists may consider this inadequate,<sup>206</sup> it may be seen as a compromise between two very opposite positions. Passage of the PPIA may also be a first step by the federal government towards recognition of legal same-sex partnerships. Additionally, it remains to be seen how international laws will influence future U.S. decisions.

By adopting a system where domestic partners register their status in something like a civil union, the United States could keep pace with the rest of the world. This system could also lead to better homogenization of current state laws, for example, adoption of a nationwide version of Vermont's Civil Union. This may be unacceptable to many gay rights activists who wish to see gay partners receive recognition of same-sex unions akin to that

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204. Dueñas, *supra* note 20, at 814-15.

205. *Id.* at 816. "Courts generally have no qualms about separating gay and lesbian citizens or aliens from their loved ones whether they are blood relatives or 'spouses.'" *Id.*

206. *See id.* at 813.

afforded to heterosexual couples by marriage. However, as the current atmosphere in the United States seems to be strongly in opposition to using the label “marriage” to apply to legal recognition of same-sex unions, enactment of a “permanent partner” registry or legalization of civil unions may be a necessary first step toward the ultimate goal of recognition of the same-sex relationship as an actual marriage. Recognition of other countries’ same-sex marriages and other unions from around the world would be prejudicial to U.S. Citizens who are in same-sex relationships who are unable to marry in the United States.

As the law currently stands, however, it is discriminatory in too many aspects against same-sex couples. The law provides limited rights for same-sex couples where both partners are foreign nationals,<sup>207</sup> but not for U.S. Citizens and permanent residents. The law also discriminates against same-sex couples by not providing them equal rights under the laws as opposite-sex couples.

Perhaps as more and more countries recognize the validity of same-sex partnerships, the United States will begin to recognize the adverse effects of current immigration policy towards same-sex couples. While it seems unlikely that the PPIA will be adopted in the near future, as more countries successfully allow for same-sex partnership recognition for immigration purposes, the United States may follow their example sooner than many think.

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207. See discussion *supra* Part II.B.1.